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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Revision of Part 22 and Part 90 of the)
Commission's Rules To Facilitate Future)
Development of Paging Systems)
)
Implementation of Section 309(j) of the)
Communications Act — Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

REPLY COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA"), by its attorneys,
respectfully submits its reply to the comments on the Further Notice of Proposed Rulemaking in
the above-captioned docket.¹

I. SUMMARY

The record in this proceeding demonstrates substantial support for the positions taken by
PCIA in its opening round comments. First, most commenters agreed that imposing new
coverage requirements at this time on nationwide licensees is not in the public interest. Such
construction requirements should not be mandated because nationwide licensees already have
expended hundreds of millions of dollars meeting pre-existing construction requirements.

¹ *Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future
Development of Paging Systems*, FCC 97-59 (Feb. 24, 1997) (Second Report and Order and
Further Notice of Proposed Rulemaking) ("Second Report and Order" and "Further Notice").

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Several parties also suggested that imposition of additional construction requirements would unlawfully modify existing licenses and constitute judicially disfavored retroactive rulemaking.

Moreover, the arguments in favor of new mandatory buildout requirements for nationwide licensees failed to take into account the fact that nationwide licensees and non-nationwide licensees are not "similarly situated," and speculated that spectrum warehousing was a common occurrence among nationwide paging providers when there was no evidence to support this claim. The record does not support the Commission adopting additional construction requirements.

Second, most entities supported rules that allow nationwide licensees the flexibility to geographically partition their spectrum. The general consensus was that such flexibility would result in more efficient use of spectrum, eliminate barriers to entry, promote competition, and encourage the provision of service to previously unserved areas. Further, there was substantial support for the passage of rules that would prevent sham partitioning transactions designed to circumvent the Commission's requirements for market area licensees.

A single commenter favored the mandatory partitioning of market area paging spectrum for Basic Exchange Telephone Radio Systems ("BETRS") providers. This argument should be rejected, however, because it is contrary to the Commission's market-oriented policies and to Section 254 of the Communications Act, under which all subsidies for rural telephony must be "specific" and collected in a "non-discriminatory" manner.

Third, the opening comments contained suggestions the Commission should consider implementing in seeking to reduce application fraud. The Commission should not, however, require application preparers to sign the application forms.

II. MOST COMMENTERS AGREED THAT IMPOSING COVERAGE REQUIREMENTS ON NATIONWIDE LICENSES IS NOT IN THE PUBLIC INTEREST

In its opening round comments, PCIA set forth a number of reasons why there was no principled reason to impose additional buildout requirements on nationwide paging licensees. First, existing nationwide licensees have already constructed systems that generally exceed the Commission's substantial buildout requirements for 931 MHz and 929 MHz paging providers. Second, changing the buildout requirements at this time will disrupt the business activities and service offerings of paging providers, who have invested substantial resources in reliance on the continuation of the current regulatory regime. Finally, the market serves as an adequate check on nationwide licensees to ensure that the nationwide channels are effectively utilized in providing service to the public. In fact, competition will ensure that operators who fail to fully construct their networks will be doomed to marketplace failure, as customers seek more reliable sources of messaging service.

The vast majority of commenters supported PCIA's position. For example, Paging Network, Inc. ("PageNet") stated that, because it had already spent over \$100 million on the buildout of facilities for its existing nationwide channels, "[i]t would be seriously damaging and harmful to PageNet and other nationwide carriers to terminate nationwide licenses based upon a new set of construction requirements when such substantial investment has already been made."² PageNet added that the adoption of new construction requirements for nationwide paging

² PageNet Comments at 3.

licensees would be an unlawful taking.³ Similarly, AirTouch Paging ("AirTouch") "strongly oppose[d] the imposition of additional construction requirements on nationwide licensees."⁴

AirTouch noted that such additional construction requirements would "penalize licensees who budgeted and scheduled construction of extensive systems consistent with the Commission's Rules."⁵

In addition, Metrocall, Inc. ("Metrocall") and others argued that the imposition of greater coverage requirements on nationwide licensees would unlawfully modify these existing licenses, thus triggering the procedural protections of Section 316 of the Communications Act.⁶ Finally, the comments suggested that such an action would constitute an unlawful retroactive rulemaking.⁷

The few arguments in support of additional construction requirements for nationwide licensees cannot be justified in light of the marketplace facts. First, a claim that buildout requirements are necessary to ensure that competition between nationwide and non-nationwide licensees is fair⁸ ignores the fact that nationwide and non-nationwide licensees are not "similarly

³ *Id.* at 5-9.

⁴ AirTouch Comments at 3.

⁵ *Id.* See also Metrocall, Inc. Comments at 3-5 (nationwide licensees have already met existing coverage requirements); ProNet Inc. Comments at 3-4 (nationwide 931 MHz licensees have already met and exceeded their buildout requirements).

⁶ Metrocall, Inc. Comments at 5-7. See also ProNet Inc. Comments at 6-7 (license renewals must be based on the same terms and conditions as the license authorization).

⁷ *Id.* at 7-9. See also PageMart II, Inc. Comments at 3 (the Commission has failed to articulate a "sufficient underlying substantial purpose" for retroactively imposing buildout requirements).

⁸ Blooston, Mordkofsky, Jackson & Dickens ("Blooston") Comments at 2.

situated,"⁹ and the FCC is under no legal obligation to subject them to identical regulatory treatment. Specifically, nationwide and non-nationwide paging licensees differ in the following important aspects: (1) nationwide licensees have already committed the resources necessary to construct nationwide networks consistent with FCC buildout rules; and (2) nationwide licensees were granted their licenses subject to explicit buildout requirements, and, as mentioned above, have crafted their business plans in accordance with these requirements.

Second, even if added buildout requirements were appropriate to prevent spectrum warehousing,¹⁰ there is absolutely no evidence that nationwide licensees are engaged in spectrum warehousing. To the contrary, the record in this proceeding indicates that nationwide carriers have already expended hundreds of millions of dollars to build nationwide networks that are currently providing service to the American public. Such a massive expenditure of resources hardly evidences a group of carriers that is sitting on its spectrum. Rather, it clearly shows that the present group of licensees is making an all out effort to provide high quality, affordably priced, nationwide messaging services.

III. THE RECORD REFLECTS THAT NATIONWIDE LICENSEES SHOULD BE PERMITTED TO ENGAGE IN GEOGRAPHIC PARTITIONING, AND THAT THERE SHOULD BE SUFFICIENT SAFEGUARDS AGAINST SHAM TRANSACTIONS FOR ALL LICENSEES

Earlier, PCIA postulated that nationwide licensees should be given the flexibility to geographically partition their license areas. Permitting such partitioning will serve the public

⁹ *Id.*

¹⁰ *See* Small Business in Telecommunications ("SBT") Comments at 3.

interest by encouraging the provision of specialized services and the competitive entry of small businesses. PCIA cautioned, however, that the Commission's partitioning rules must include safeguards that will prevent evasion of the FCC's buildout requirements for all market area licensees through sham partitioning arrangements.¹¹

A number of other parties also favored the voluntary geographic partitioning of nationwide license areas. AirTouch stated that partitioning provides "licensees with flexibility, results in more efficient use of spectrum, eliminates market entry barriers and encourages market participation by small businesses, promotes competition, and expedites the introduction of service to unserved areas."¹² PageMart II, Inc. added that partitioning "may be used to provide geographic and service flexibility to many companies, especially smaller entities who may want to focus on discrete services or coverage areas."¹³ Finally, there was significant support for PCIA's suggestion that, in order to prevent sham partitioning transactions, both the partitioner and the partitionee of any market area license should be made responsible for meeting the Commission's buildout requirements.¹⁴

Contrary to the weight of opinion in this proceeding, Nucla-Naturita Telephone Company ("NNTC") demanded that the Commission "give each rural telephone company the right to require, *at no cost to itself*, the market area licensee to partition those portions of its market that

¹¹ PCIA also argued that disaggregation of paging channels at this time is neither technically or economically feasible.

¹² AirTouch Comments at 3-4.

¹³ PageMart II, Inc. Comments at 4. *See also* Metrocall, Inc. Comments at 20; ProNet Inc. Comments at 8.

¹⁴ *See, e.g.,* AirTouch Comments at 7; PageMart II, Inc. Comments at 4.

are required by the rural telephone company to provide BETRS service."¹⁵ NNTC stated that without such forced partitioning, BETRS providers would be compelled to bid on the channels necessary to provide BETRS service or "be at the mercy of the auction winners."¹⁶

PCIA believes that NNTC's proposal is neither in the public interest nor necessary for the preservation of rural telephone service. Regarding the public interest calculus, the mandatory partitioning of paging spectrum for the benefit of providers of rural telephony — at no cost to these providers — would represent the subsidization of rural telephony by paging providers and their customers. Such an implicit subsidy would fly in the face of the Commission's policy of allowing market mechanisms to allocate telecommunications resources,¹⁷ and run contrary to the nation's universal service policy, under which subsidies for rural telephony are to be "specific" and funded in a "non-discriminatory" manner.¹⁸ If the Commission determines that the public interest, convenience and necessity demands increased spectrum for BETRS, then it should initiate a proceeding to explicitly provide this spectrum. It should not, however, use its nationwide paging rules as a means of implicitly supporting the BETRS program.

Moreover, the BETRS program will remain viable even without the drastic action demanded by NNTC. As NNTC concedes, "the areas served by BETRS are sparsely populated and, due to their distance from urbanized areas and low population densities, are not typically

¹⁵ NNTC Comments at 3-4 (emphasis added).

¹⁶ *Id.* at 4.

¹⁷ *See Second Report and Order*, ¶ 4 (stating that "competitive success [should be] determined by the marketplace, rather than by regulatory distinctions").

¹⁸ 47 U.S.C. § 254(d).

served by paging carriers."¹⁹ Under such circumstances, rural telephone companies would be free to negotiate with licensees regarding a partitioning arrangement.²⁰ In this way, contrary to NNTC's proposal, spectrum is more likely to be put to its most economic use.

IV. THE RECORD CONTAINS NUMEROUS RECOMMENDATIONS THAT SHOULD HELP TO REDUCE APPLICATION FRAUD

Unfortunately, the Commission received few comments on its request for suggestions as to how to curb application abuses. Several commenting parties did, however, offer suggestions that warrant consideration by the Commission in developing requirements that would lead to a reduction in the receipt of speculative applications.

PCIA supports a number of the suggestions made by Metrocall. PCIA agrees that additional disclosures and warnings on the FCC Form 600 may assist in minimizing fraud. PCIA wishes again to caution that such amendments to the application form are not a complete curative measure, in light of PCIA's experience that many "consumer" applicants do not read any part of the FCC Form 600 (or FCC Form 800A) before signing the document. As a result, any disclaimers or warnings may have little or no effect on this group of applicants. For example, the addition of a representation that the applicant is financially qualified is not offensive to PCIA, but will be considered by some applicants and/or applications mills to be merely another box in which to place a check mark. This should not discourage the Commission from making such

¹⁹ NNTC Comments at 5.

²⁰ Moreover, it may be unfair and inaccurate for NNTC to assume that all paging licensees would not build out service to rural areas.

efforts, however, as there will be *some* applicants who will review the verbiage before signing and will take it into account.

The comments of the Federal Trade Commission ("FTC") are helpful in explaining how the application mill process works. As indicated above, PCIA also agrees with the FTC that additional disclosures will somewhat aid in the reduction of fraudulent activity. Once again, however, the disclosures will not result in a total elimination of the problem.

Metrocall suggests that the Commission require applicants to certify as to transmitter site availability as part of the application package. PCIA would conditionally support this requirement, provided that the requirement does not result in a longer period of time for Commission processing of applications.²¹ PCIA is concerned with Metrocall's suggestion that the Commission send a letter request for information demonstrating transmitter site availability "only to those applicants that display speculative warning signs." This type of selective enforcement could lead to litigation and delays in licensing.

If, on the other hand, the FCC Form 600 is amended to include a certification of transmitter site availability, there may be *some* reduction in speculative applications. The Commission must recognize, however, that an application mill could contact a site owner and receive assurance of transmitter site availability for a single applicant, and then use that assurance for hundreds of different applications. Thus, even this step will have limited impact

PCIA does not believe that the Commission should place specific requirements on frequency advisory committees for ameliorating fraudulent applications. In this regard, PCIA

²¹ Assurance of transmitter site availability should only be required when the applicant is applying for a new facility, not a modification or renewal.

concur with Metrocall in opposing any requirement that application preparation services must sign the Form 600. It is appropriate, however, for frequency advisory committees to alert the Commission where the committee spots potential rule violations.

V. CONCLUSION

The Commission should not impose buildout requirements on nationwide licensees, should permit all licensees to geographically partition their licenses subject to appropriate safeguards, and should take whatever measures are practical to prevent fraudulent applications.

Respectfully submitted,

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